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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CASCADES COMPUTER INNOVATION
LLC,

Plaintiff,

v.

RPX CORPORATION; HTC
CORPORATION; and SAMSUNG
ELECTRONICS, CO., LTD.

Defendants.

Case No. 4:12-cv-01143 YGR

JOINT STATUS STATEMENT

Date: December 5, 2014
Time: 9:01 a.m.
Judge: Hon. Yvonne Gonzalez Rogers
Location: Courtroom 1

Pursuant to the Court's September 30, 2014 Order Extending Stay and Setting Status Hearing (Dkt. No. 150) (the "Stay Renewal Order"), the parties respectfully submit this joint statement to (1) update the Court on the results of an October 24 Settlement Conference in the '750 patent litigation pending in the Northern District of Illinois, along with other recent developments in that action, and (2) state the parties' respective positions on whether it is appropriate for Cascades to take limited discovery with respect to RPX's former employee, Kevin Barhydt.

Joint Summary of Progress in the N.D. Illinois Patent Actions

Cascades' '750 patent cases against Samsung and HTC remain consolidated for pre-trial purposes. A separate case on a different patent exists against Samsung (N.D. Ill., Case No. 1:14-cv-5691, Dkt. 1). In the '750 patent case, the Court conducted a mandatory Settlement Conference involving just Cascades and Samsung on October 24, 2014. (N.D. Ill. Case No. 1:11-cv-04574 ("N.D. Ill."), Dkt. No. 189). The Conference did not result in a settlement and the Court has determined that there is an *impasse* (N.D. Ill. Dkt. No. 215, attached).

Samsung and HTC filed a joint motion for summary judgment of non-infringement on September 24, 2014 in the '750 patent case. (N.D. Ill. Dkt. No. 198). Cascades filed its opposition to the motion on November 7, 2014. (N.D. Ill. Dkt. No. 208). Samsung's and HTC's reply brief is due on December 5, 2014. (N.D. Ill. Dkt. No. 202). This is the final motion for summary judgment to be decided in the '750 patent case.

Cascades has filed a separate suit against Samsung involving Cascades' U.S. Patent No. 6,366,130 and DRAM memory chips, which is on an independent track. (N.D. Ill., Case No. 1:14-cv 5691, Dkt. 1). This is another of the 38 Elbrus patents that are licensed to Cascades.

Plaintiff's Statement Opposing Further Stay And Requesting The Deposition Of Kevin

Barhydt And Limited Production Of Documents

Defendants have successfully managed to prevent any discovery in this case for nearly three years. The lawsuit was filed on March 7, 2012 and, after various motions to dismiss, the Court found on December 3, 2013 that Cascades had stated a proper claim for relief ("[T]he Court concludes that Cascades' amended complaint, unlike its initial complaint, alleges specific facts

1 raising a reasonable inference that the Manufacturing Defendants and RPX engaged in a so-called
 2 “hub-and-spoke” conspiracy to force sub-competitive pricing for Cascades’ patent licenses by
 3 monopsonizing the market therefor.”) (Dkt. 119, p. 2). In the year since that decision, repeated
 4 orders staying all discovery have been entered at defendants’ requests on March 4, 2014, July 8,
 5 2014 and September 30, 2014 (Dkts. 133,137, 150). As a consequence, RPX and its members,
 6 Samsung and HTC, have effectively avoided the production of any documents or testimony that
 7 could establish their liability. No communications between RPX and its members during the
 8 relevant time period have been produced, nor have files been provided of third-party witnesses,
 9 like Kevin Barhydt, Motorola’s Brett Rosselein and other key former RPX employees who were
 10 involved in the antitrust conspiracy.

11 Kevin Barhydt was RPX’s Vice President, Head of Acquisitions, and is a key player in the
 12 antitrust conspiracy. He has intimate knowledge of RPX’s business practices; he negotiated
 13 license terms with Cascades; then he communicated RPX’s and its co-conspirators’ decision not to
 14 proceed at the initially agreed-upon price. As specifically alleged in the Amended Complaint:

15
 16 32. By September 23, 2011, Barhydt told Cascades that RPX had
 17 raised sufficient money from its members to acquire a license under all the
 18 Cascades patents, including the ‘750 patent. Meetings and/or direct contact
 19 and communication between RPX and defendants Motorola, Samsung, HTC
 20 and other RPX members preceded the September 23, 2011 offer to Cascades
 21 and continued thereafter. On September 20, 2011, Motorola’s top licensing
 22 executive, Brett Roesslein, admitted that Motorola would not deal
 23 independently with Cascades and that its intention was to deal only through
 24 RPX, stating, “We would like to resolve this through RPX.”

25 33. Later, in mid-October 2011, Barhydt told Cascades that RPX
 26 had to withdraw its offer because one or more of its members would not fund
 27 the license deal at the offered amount, admitting, in effect, that all relevant
 28 members either had to agree to a license or none would agree.

34. On November 2, 2011, Barhydt referred to the relevant RPX
 members as “our clients” and represented that the key RPX client-members
 wanted “a global solution” to the Cascades matter. He also admitted that
 client-members in combination, not RPX, have the ultimate say in
 determining what RPX would pay and that RPX was negotiating collectively
 for its members:

Solving problems for our clients is the role of RPX- but we
 aren’t in a position where we can pay more for something than
 what our clients value it at.

1 Meetings, email and telephone contact between RPX and its key members
 2 took place in October and November 2011. Cascades is aware, for example,
 3 that a meeting between RPX and C.D. Hwang of Pantech (an RPX member
 4 that was sued for infringement of the '750 patent) was scheduled for
 November 7, 2011 to discuss RPX's acquisition of a license under the
 Cascades patents. Motorola, Philips and other RPX members also admittedly
 had contact with RPX on the Cascades patents as well.

5 35. RPX admitted through Barhydt that it was negotiating
 6 collectively on behalf of its key members for a license under all the
 Cascades/Elbrus patents: "**our clients** don't want to hear about Cascades
 7 again." Later, he told Cascades why RPX wanted a license under all the
 Cascades patents, not just the '750 patent:

8 my point was that **our clients** don't want to solve this one
 9 Cascades case (on the '750 patent) – only to basically fund
 additional litigations from Cascades. **They** want a global
 10 solution to Cascades – not just a solution on this one particular
 case – knowing that there will be others to follow.

11 It wasn't that I (or **our clients**) didn't want to hear about
 12 Cascades again. We/they just don't want to have to solve this
 problem multiple times.

(Dkt. 94, pp. 14-15).

13 The parties' agreement to preserve documents (Dkt. 74) does not bind third-party
 14 witnesses like Kevin Barhydt, a former RPX employee, or Brett Roesslein of Motorola (later,
 15 Google, and now, Lenovo), each of whom may well have documents in their personal possession.
 16 Nor does the agreement counteract the inevitable risk that memories diminish over time.
 17 Although decided in the context of a request to stay based upon an untimely reexamination
 18 request, this Court, in *Fresenius Medical Care Holdings, Inc. v. Baxter International, Inc., et al.*,
 19 2007 WL 1655625 at *5 (N.D. Cal. June 7, 2007) made the point that fading memories and lost
 20 evidence inherently will occur three years after a complaint is filed. ("In the lengthy delay that
 21 would inevitably ensure if a stay were granted, evidence could be lost and witnesses' memories
 22 could fade. Accordingly, this factor weighs heavily in favor of denying a stay." (citation
 23 omitted)). See also, *Abassi v. BAE Systems Information Solutions*, 2010 U.S. Dist. LEXIS
 24 115928 at *3-4 (S.D. Cal. November 1, 2010) ("Plaintiffs have demonstrated that they may suffer
 25 damage if the stay is granted. Several witnesses with information relevant to this case are third
 26 parties outside the control of Plaintiffs and Defendants. Significant delay in initiating discovery
 27 may result in faded memories and lost documents.")
 28

1 The *Lithium Ion Batteries, Masimo* and *Apotex* cases relied upon by defendants did not
2 involve a portfolio of 38 patents, only two of which are in litigation. Here, the ‘130 patent case is
3 on a separate track before a different judge. A decision in the ‘750 patent case will not be
4 dispositive of the antitrust case, nor substantially narrow it, as defendants have repeatedly
5 promised.

6 In *In re Lithium Batteries Antitrust Litigation*, this Court ***allowed the plaintiffs to take***
7 ***limited discovery*** despite the Defendants’ argument that all discovery should be stayed prior to
8 rulings on motions to dismiss. 2013 WL 2237887, at *1 (N.D. Cal. May 21, 2013). Although this
9 Court recognized that antitrust discovery can be expensive and burdensome, it also recognized that
10 “the costs and burdens of antitrust discovery do not erect an automatic barrier to discovery in
11 every case in which an antitrust defendant challenges the sufficiency of a complaint.” *Id.* at *2.
12 Here, Cascades has already survived Defendants’ motions to dismiss. Cascades should not be
13 denied even the very limited discovery relating to Mr. Barhydt based on the mere possibility that
14 Defendants’ could raise a future argument for dismissal depending on the outcomes of the ‘750
15 patent litigation, particularly where there is no reason to believe such an argument would be
16 successful.

17 In *Masimo Corp. v. Philips Elecs. N. Am. Corp.*, the court bifurcated the plaintiff’s patent
18 claims and the defendant’s antitrust claims. 2010 WL 925864, at *2-3 (D. Del. Mar. 11, 2010). In
19 so doing, the court recognized that there would be little prejudice to the defendants because they
20 could have brought the “antitrust counterclaims years ago, yet instead waited until this litigation.”
21 *Id.* Here, Cascades brought its antitrust claim promptly, and thus should not be forced to submit to
22 the risks associated with the loss of evidence and fading memories. Moreover, unlike *Masimo*, the
23 outcome of the Northern District of Illinois patent litigation will not affect Cascades’ antitrust
24 claims.

25 In *Apotex, Inc. v. Senju Pharmaceutical Co., Ltd.*, the court granted only a limited stay of
26 antitrust proceedings pending resolution of an appeal to the Federal Circuit. 921 F.Supp.2d 308,
27 315-316 (D. Del. 2013). In the event that the Federal Circuit allowed the patent case to proceed,
28 the court declined to stay the antitrust proceedings pending resolution of the patent case’s merits.

1 *Id.* at 316, n. 16. Here, Cascades' antitrust case has already been stayed for almost a year, and
 2 Defendants effectively propose to extend this stay indefinitely.

3 Contrary to defendants' arguments, the antitrust case is not limited to just a refusal to
 4 license the '750 patent. Mr. Barhydt admitted that RPX needed a license for its members under all
 5 38 of the Elbrus patents (not just the '750 patent) (Dkt. 94, ¶ 35) and the boycott impacted
 6 Cascades' ability to license all the patents. Hence, the filing of a separate suit against Samsung on
 7 the '130 patent is far from irrelevant. A boycott on that patent adversely impacted Cascades'
 8 ability to license RPX, Samsung and others at fair prices.

9 Defendants also now claim enormous expense in providing a limited production of Mr.
 10 Barhydt's communications with RPX members and within RPX itself regarding Cascades, its
 11 patents and the terms of the proposed license. That is not a voluminous, burdensome request.
 12 Samsung and HTC need only produce their communications with Mr. Barhydt and others at RPX
 13 regarding Cascades and its patents. The relevant documents have likely already been examined in
 14 the preparation of defendants' voluminous briefs seeking to dismiss this case. There simply is no
 15 undue burden to RPX, Samsung and HTC, each of whom have more than adequate resources to
 16 produce documents and make a single witness available for a one-day deposition.

17 Finally, it has been a year since this Court concluded Cascades had adequately pled an
 18 antitrust claim. It should now be permitted to move forward with discovery and trial preparation
 19 without further delay.

20 **Defendants' Statement Regarding Maintenance of the Stay and Opposing Early Discovery**

21 **Regarding Kevin Barhydt**

22 Allowing Cascades to conduct discovery regarding Mr. Barhydt while the stay of this
 23 action remains in place would be both unnecessary and contrary to the Court's justification for
 24 imposing the stay in the first place.

25 As recognized by the Court in its prior stay orders, the primary efficiency of the stay is in
 26 allowing the parties to avoid costly—and potentially unnecessary—antitrust discovery until the
 27 patent cases have brought the scope of Cascades' antitrust claims into sharper relief. *See, e.g., In*
 28 *re Lithium Ion Batteries Antitrust Litigation*, No. 13-MD-02420 YGR, 2013 WL 2237887, at *2

(N.D. Cal. May 21, 2013) (J. Gonzalez Rogers) (“[A]ntitrust discovery can be enormously expensive and burdensome”); *Masimo Corp. v. Philips Elecs. N. Am. Corp.*, Civ. A. No. 09-80-JJF-MPT, 2010 WL 925864, at *3 (D. Del. Mar. 11, 2010) (staying antitrust action pending result of patent litigation because result of latter could moot or streamline requested antitrust discovery); *accord Apotex v. Senju Pharma. Co., Ltd.*, 921 F. Supp. 2d 308, 315 (D. Del. 2013). Allowing Cascades to engage in early, piecemeal discovery, at a time when the parties are actively briefing dispositive motions in the patent cases, would defeat this purpose.

Cascades once again argues that the resolution of dispositive issues in the patent cases cannot affect the scope of discovery in this case because the patent cases involve “only” the ‘750 patent, and not the other Elbrus patents referred to in Cascades’ antitrust complaint. The Court has already rejected this argument. Cascades alleges in its Complaint that the only patent “the manufacturer defendants specifically needed access to and were using was the ‘750 patent,” and Cascades has only pleaded injury from its alleged inability to license the ‘750 patent as to devices using Google’s Android operating system. *See* Amended Complaint, ¶¶ 19, 92-100. Thus, as this Court has observed, the ‘750 patent is at a minimum the “primary patent at issue” in this case. *See, e.g.*, Dkt. No. 93 at 21:18-21; Dkt. No. 133 at 3:20-22 (“In this case, as Defendants aptly remark, if the Illinois litigation determines that Plaintiff’s ‘750 Patent is invalid, any damage stemming from a refusal to negotiate a license under that patent may well prove to be illusory.”). It is therefore irrelevant that Cascades has recently filed another patent case against one of the Defendants here, Samsung, involving a second Elbrus patent. The patent at the heart of *this case* is the ‘750 patent.

While Cascades purports to request a “limited production of documents,” it makes no attempt to explain or define that phrase—and indeed, Cascades’ “limited” discovery request appears already to be expanding. Where Cascades originally purported to seek documents only for Mr. Barhydt, it now refers for the first time to a second individual, Brett Rosselein, and potentially “other key former RPX employees” as well. This suggests that allowing Cascades to conduct “limited” early discovery regarding Mr. Barhydt could result in ancillary disputes about

1 the proper scope of that discovery—disputes that may be avoided by denying Cascades’ request
2 for interim discovery and allowing the stay to run its course.

3 Nor does Cascades articulate any basis for its conjecture about the “expense” Defendants
4 would incur in responding to its completely undefined discovery requests. In fact, the time and
5 costs associated with preparing even a “limited” production of documents at this early stage would
6 be significant, and contrary to Cascades’ suggestion has not already been incurred by the
7 Defendants. This is particularly true for the manufacturing defendants, Samsung and HTC, who
8 have never employed Mr. Barhydt and have no custodial files for him. To search for documents
9 related to Mr. Barhydt, these Defendants would be required to investigate and identify the relevant
10 document custodians; locate, load, and process these custodians’ electronically-stored information;
11 formulate and run searches likely to obtain communications involving Mr. Barhydt; review the
12 results for responsiveness and other issues; and then prepare a production. Then, if and when a
13 more comprehensive discovery process becomes appropriate in this litigation, Samsung and HTC
14 would be required to go through all of these same steps again in preparing their broader document
15 productions. The same is largely true for RPX. Defendants presume Cascade would want all files
16 relating to Mr. Barhydt and not just his custodial files; if so, RPX would be put to the same
17 likelihood of expensive and duplicative searches. Such extensive duplication of efforts would
18 undermine the original purpose of the stay—to ensure that any necessary discovery in this
19 litigation proceeds in the most efficient manner possible.

20 Moreover, there is simply no reason for conducting early discovery regarding Mr. Barhydt.
21 While Mr. Barhydt is no longer employed by RPX, Cascades does not contend that he has left the
22 country or will otherwise be unavailable to participate in discovery at the appropriate time.
23 Moreover, the alleged conduct at issue in this litigation occurred recently—in 2011 and 2012—
24 and the parties have taken necessary steps to preserve potentially relevant evidence. *See* Dkt No.
25 74 (Joint Case Management Statement), ¶ VI. In short, there is no reason to believe that early
26 discovery regarding Mr. Barhydt is necessary to preserve evidence. And indeed, this Court has
27 already rejected the notion that the type of stay in place here poses an unusual risk that evidence
28 will be lost. *See, e.g.*, March 4, 2014 Order Staying Case (Dkt. No. 133) at 5:1-4 (“Plaintiff’s

1 fourth and final prejudice argument is that the stay will result in lost evidence due to fading
2 memories and witness unavailability. The Court disagrees....A concern for loss of evidence exists
3 anytime a court issues a stay and does not supply sufficient grounds to refrain from issuing an
4 otherwise appropriate stay.”); *Apotex*, 921 F. Supp. 2d at 316 (rejecting plaintiff’s arguments that
5 it would be prejudiced by “fading recollections or vanishing witnesses”; plaintiff “has not
6 proffered any reason why such concerns would be especially relevant in the instant case.”).

7 Cascades’ heavy reliance on the *Lithium Ion Batteries* case is misplaced. The partial stay
8 imposed in that litigation, which was tied to the Defendants’ pending motions to dismiss, has
9 nothing to do with the type of stay in place in this litigation—*i.e.*, a stay of antitrust discovery
10 pending closely related patent litigation that Cascades elected to file in another District. In the
11 case of a stay pending the resolution of motions to dismiss, it is conceivable that some limited
12 discovery could be appropriate as to issues unaffected by the pending motions. But that is not so
13 here, where *all* discovery in this antitrust case potentially could be narrowed or obviated by the
14 resolution of dispositive issues in the patent cases.

15 Similarly, the facts and reasoning of *Fresenius Medical Care* bear no resemblance to the
16 facts here. In *Fresenius*, the Court refused to impose a stay requested more than *three years* after
17 the case had been filed, at a time when discovery had been completed, summary judgment motions
18 had been resolved, two trials had been held (one on liability and another on damages) and a third
19 trial was about to commence. 2007 WL 1655625 at *1-3. The Court rejected the stay request
20 because it found the requesting party’s “dilatory motives could not be more apparent” as the
21 request was made “at the 11th hour after suffering a substantial setback.” *Id.* at *4-5. Moreover,
22 the Court found the stay would be too lengthy because it was tied to a reexamination of the patent
23 at issue by the U.S. Patent and Trademark Office, a process that can take years and allows multiple
24 levels of appellate review. *Id.* at *5.

25 Here, of course, Defendants request simply that the discovery stay imposed at the outset of
26 this litigation be allowed to remain in place long enough to serve its originally intended purpose.
27 And unlike the stay at issue in *Fresenius*, there is no concern that the stay will be allowed to linger
28 indefinitely due to events outside the Court’s control. The Court has always retained full authority

1 over the duration of the stay and has closely monitored the progress of the patent cases throughout.
2 It should continue to do so until the potentially dispositive issues in the patent cases are fully
3 resolved.

4 Dated: November 25, 2014 Respectfully submitted,

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24 **E-FILING ATTESTATION**

25 I, Michael W. Scarborough, am the ECF User whose ID and password are being
26 used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest
27 that each of the signatories identified above has concurred in this filing.

28 /s/ Michael W. Scarborough
Michael W. Scarborough